United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

ORIGINAL

75-7159

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

against

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

BRIEF OF CONNECTICUT BAR ASSOCIATION AS AMICUS CURIAE

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Preliminary Statement

This brief on behalf of the Connecticut Bar Association as amicus curiae has been filed pursuant to the invitation of the Court. It concerns itself, again pursuant to the invitation of the Court, with the motion of plain-

tiffs to disqualify counsel for defendants in the case at bar. It deals primarily with the applicability of Canons 4 and 5 of the Code of Professional Responsibility to the sort of facts represented herein, and with the broader implications and ramifications of applying the Ethical Considerations and Disciplinary Rules of Canons 4 and 5 to such situations. It is appropriate at the outset, however, to state with some particularity how counsel for the amicus views his role in this matter.

It is the understanding of counsel for the amicus that the role of an amicus curiae brief is not one taking a position on the precise factual issues before the court, of many of which counsel may not be aware (indeed, while counsel has seen copies of all briefs and of the joint appendix of the parties in this case, he has not had access to the Record, and thus has not seen, *inter alia,* the underlying complaint in the action). Rather, counsel views the role of amicus as being one of a disinterested party, analyzing the general, practical, legal, and philosophical problems exemplified and raised by the facts of the case at bar, to illuminate the darker corners of the problem, and to suggest criteria, considerations, ramifications, and goals which ought to impinge upon the court's deliberations in the particular case. Accordingly, this brief will not attempt to pretend to speak authoritatively on the facts of the case at bar or to take a position either for or against affirmance of the order below. Rather, it will discuss factors in this area of concern which ought, in our opinion, to inform the opinion and judgment of this court in this and like matters.

The issues in this case are several in number, including some not mentioned in the opinion below. The central issues, however, may be termed "the advocate as witness" and "the advocate as party" issue; and these will be treated first, and in that order.

The Advocate as Witness Issue

The Canons and Disciplinary Rules contained in the Code of Professional Responsibility were adopted by the Judges of the Superior Court of the State of Connecticut effective October 1, 1972; and the Ethical Considerations were approved in principle, effective that same date. Two Ethical Considerations and two Disciplinary Rules are of particular relevance to this issue; they are the following:

> EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.
>
> EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a

witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because

witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

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(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because

of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

As such, the Code allowed, especially in the exception of DR 5-101(B) (4), some leeway in determining when a law firm could continue to provide both trial counsel and witness; although (B) (4) permitted this dual role only where to refuse it would work a "substantial" hardship on the client "because of the distinctive value of the lawyer or his firm as counsel in a particular case", a standard which, if strictly adhered to, would significantly limit the occasions when the exception might be invoked.

The Superior Court went even further, however, effective October 1, 1974, and amended the Code governing Connecticut lawyers by repealing the exception in DR 5-101(B)(4). Thus, even if a substantial hardship is worked upon the client because of the "distinctive value of the lawyer or his

firm as counsel in the particular case," in *state* court matters in Connecticut a firm must decline employment if it is known or obvious that a lawyer in that firm "ought to be called as a witness" (presumably, as a witness for any party).

This amendment was adopted to reinstate in Connecticut the stricter rule laid down in *Jennings* v. *DiGenova,* 107 Conn. 491, 498, 499, 141 A. 866 (1928), cited with approval by the Court below. Thus, if the case at bar had been pending in a *state* court in Connecticut, and Julius Apter was in fact a present lawyer in the firm of Apter, Nahum & Lenge, that firm would have been required to decline the employment, since it would have been known or obvious that Apter ought to be a witness and that his testimony was likely to be on a contested matter, and not solely on a matter of formality or the nature and value of legal services rendered.

That this stricter version is now the rule in Connecticut *state* courts might be persuasive that that stricter rule ought to be followed in Connecticut's federal courts as well, in the interest of uniformity and reciprocity, and so as not to permit a firm whose client is sued in state court to avoid the force of that rule by removing the case to federal court in the hope of availing itself of the exception of DR 5-101 (B)(4). Indeed, Local Rule 2(f) of the Connecticut District Court expressly provides:

> This court recognizes the authority of the "Code of Professional Responsibility of the American Bar Association" (as approved by the Judges of the Connecticut Superior Court as expressing the standard of professional conduct expected of lawyers).

Because of the uniqueness of the Connecticut restriction, however, coupled with the prestige of this Court's opinions, the larger jurisdiction in which its rulings are binding, and the paucity of case law in any circuit or state on this sub-

ject, it would certainly be in order for this Court, should it decide to affirm on the basis of the Connecticut Rule, clearly to articulate the geographical limits of its holding, lest broader application of this restrictive rule be inferred by those practicing in states where (B)(4) remains in full force and effect.

This Court, however, is not *bound* even in this Connecticut federal court case to follow the narrower view of the Connecticut Code; indeed, as the Court below noted, "there is no statutory obligation upon the federal courts to apply the disciplinary rules of the Code of Professional Responsibility . . . in deciding motions to disqualify counsel . . ." This Court has inherent power to ensure that ethical conduct is maintained by lawyers appearing in this Circuit; and that power can not be circumscribed either by the proposals of a voluntary association of lawyers or by the rules adopted by State Court judges to govern conduct in their own courts. It behooves this court, therefore, while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.

This invitation to explore behind and around DR 5-101(B) and DR 5-102(A) is prompted by an examination of the articulated rationale in *Jennings, supra*, for the prophylactic rule it lays down, a rationale—or alternative rationales—which appear, at least in part, to have inspired the drafters of the Code as well. A serious question is raised as to the continuing validity in all instances in 1975 of these 1928—and earlier—fears.

Jennings must, first of all, be viewed on its particular facts. In that case "the defense of the defendant rested

wholly on the testimony of Mr. Finkelstone, an attorney and partner in the firm of Lavery & Finkelstone, as to an agreement made by him with Mr. Morgan of the firm of attorneys representing the plaintiff and appearing in the trial." *Jennings* at 496. From what appears in the printed opinion, the firm of Lavery and Finkelstone appears to have been a small firm, perhaps comprised of only Messrs. Lavery and Finkelstone. The year was 1928, and the number of lawyers then in practice in Connecticut was considerably smaller than it is today. The 1928 State Register and Manual reveals that all members of the Connecticut Bar probably totaled no more than two thousand; whereas on June 30, 1975, the Connecticut Bar Association alone had 4,744 members, and it is estimated that there are some 6,000 members of the Connecticut Bar itself. The Court noted that Mr. Morgan, trial counsel for plaintiff, would also have to be a witness as a result of a counterclaim filed by defendant through Lavery and Finkelstone. It is unclear how large Mr. Morgan's firm was, but there is in the opinion no indication that it was a large firm; Mr. Morgan had both negotiated the disputed agreement and was now acting as trial counsel, whereas Mr. Finkelstone had not participated in the trial, but had left that to Mr. Lavery. The Court noted that the pleadings were signed in the firm name, which included Mr. Finkelstone's, though only Mr. Lavery had signed the brief. *Ibid.* It is assumed that Mr. Finkelstone would share in the fees earned from defendant as a result of his firm's handling of the case. The Court held that Mr. Finkelstone, though not a participant in the trial of the case, should still not have been a witness in a case tried by his partner.

In reaching this conclusion the Court cited, at pages 496-497, two basic rationales:

> Our Rule is founded upon our belief that it is unfair to the client that his case should be presented through witnesses whom the trier will necessarily treat as in-

> terested, not only through the zeal of advocacy, but also through interest in the result of the trial, instead of as witnesses without self-interest or other zeal than that of the ordinary witness. It is also and primarily founded upon the obvious dictate of public policy, which requires that the profession of law shall be practiced so as to avoid the bringing of distrust and suspicion upon its members who serve as witnesses in establishing the facts of a complaint or defense, and then as advocates in pressing home to the trier the truth of their statements as witnesses.

With respect to the claimed unfairness to the *client*, it might well be asked whether the client ought not to be consulted as to whether he feels he is being unfairly treated in the premises. The Court's opinion appears to presume a passive and helpless client, without any opportunity to determine who will represent him and what witnesses will be called on his behalf. And yet, at least so far as choice of counsel is concerned, it is contrary to common experience to contend that the client has foisted upon him the counsel handling his case (except perhaps in insurance subrogation or defense matters, both instances posing infinitesimal likelihood of the need for attorney-witnesses).

Presumably, too, the client is well aware of the need to have a partner or associate of his lawyer as a witness in the presentation of "his case" (*id.*, at 496); and this fact does not concern him. If the Court is unsure and concerned about this, however, it could presumably inquire of the client at a special hearing whether the common bond between witness and advocate, and the fact that the trier will treat the testimony as "interested", makes any difference to the client, and then let the *client* decide. It is more likely than not that the client wants and needs the testimony of the witness. It is also more likely than not that the client has a continuing relationship with the firm, which has given that firm peculiar knowledge of and insight into

the affairs of the client, thus rendering it infinitely better able intelligently to try the case on his behalf. Indeed, the continuing relationship is a logical inference from the fact that a lawyer in the firm finds himself in the position of a witness for the client. It is thus more than likely that the client will be willing, if offered the opportunity, to risk the taint of "interested" testimony for what to him are the undoubted benefits of having the firm in which he reposes special confidence handling his case. There is a strong argument that the choice ought to be the client's, and not the Court's or opposing counsel's; or at least that the client sought to be protected ought to be consulted on the matter.

With respect to the taint of interest in the witness—"interest in the result of the trial, instead of as witnesses without self-interest or other zeal than that of the ordinary witness" (*id.*, at 497)—it is submitted that that goes to the question of weight and credibility and not to the question either of competence to testify (if his firm remains as counsel) or of competence of the firm to try the case (if the witness takes the stand). It is further submitted that the "interest in the result of the trial" of the witness would be no less simply because *pro hac vice* a different firm were brought in to try the case for a client all of whose *other* affairs the witness's firm continued to handle and expected to handle into the indefinite future.

Further on the subject of interest, common experience teaches that many if not most witnesses are "interested" in the proceedings, in that they favor the cause of the party on whose behalf they are called, are called because their testimony is expected to redound to that party's benefit, and might be better served by the party's victory than by his defeat. Spouses, parents, offspring, siblings, and other relatives; business subordinates whose continued employment depends on the party's favor; chief suppliers and best customers, whose future financial hopes are tied

to the party's success; fellow directors whose exposure to liability increases if the party is held liable—the list is endless. It might even include the non-lawyer business partner of the attorney trying the case. The point of all of this is that these are all "interested" witnesses—some, and perhaps all, far more "interested in the result of the trial" than the lawyer's partner. Yet the court has exhibited no such solicitude for the unfairness to the client arising from *their* testimony. It does not—if, indeed, it could—require them to cease their employment, to cease supplying, to cease purchasing. It leaves their "interest" to be elicited upon cross-examination and to be weighed by the trier in the balance with all other factors impinging on the witness's testimony. Why should the client be forced to make a choice between firm and witness simply because the witness happens to be in his lawyer's firm?

The primary rationale of the *Jennings* Court, however, appears to have been avoiding the "bringing of distrust and suspicion upon [lawyers] who serve as witnesses in establishing facts of a complaint or defense, and then as advocates in pressing home to the trier the truth of their statements as witnesses." (*id.*, at 497). "The public will be apt to think that the lawyer . . . will be inclined to warp the truth in the interest of his client" (*id.*, at 498-499). The Court then goes on, once again, to enunciate a doctrine of protection of the interests of others. It states, at 499:

> The rule of prohibition for the inactive partner, as for the active partner, is for his own protection, not because the court thinks that he, in either case, will in fact often be exposed to temptation, but to avoid the appearance of wrongdoing.

We discuss below the distinctions to be drawn between active and inactive partners. Here let it suffice to comment upon the need for the protection of either. For the Court's rationale appears clearly grounded not upon any

felt need to protect the reputation of the legal profession *qua* profession from public distrust. Rather, the public policy is expressed in terms of avoiding distrust falling upon "its members who serve as witnesses . . ." (*id.*, at 497); to avoid the impression that "the lawyer [who is a witness] will be inclined to warp the truth in the interest of his client" (498-499); it is "for his own protection, not because the court thinks that he, in either case, will in fact often be exposed to temptation, but to avoid the appearance of wrongdoing" (499). Only from Professor Wigmore is there concern about the possible diminution and undermining of "the public's respect for the profession and confidence in it" (*id.*, at 498).

Thus, we have once more a rationale for a prophylactic rule having serious consequences for a litigant, which takes away from a participant—here, the trial lawyer in consultation with his client—the decision-making authority on a matter which should primarily be of utmost importance to him alone: public suspicion and distrust of him and his firm, as contrasted with the profession of law in general. Once again, the Court purports to be acting to protect someone from himself, without inquiring whether he or his client wants or feels the need for such protection; or is willing to risk his own reputation to public mistrust, however unfounded, in order to serve what he feels are the dictates of justice. How much greater that distrust might be were the firm simply to refrain from trying this *particular* case, while continuing to represent the client on all other matters—a fact which would doubtless be elicited on cross-examination—might well impel a firm to decide that public distrust of it would be ***allayed,*** rather than fostered, by an honest and open posture of trying the case and providing a knowledgeable partner as a witness. Indeed, those very considerations might well allay public mistrust of the profession generally, assuming that to be a possible rationale for the rules.

With respect, too, to the issue of "public" distrust, it is legitimate to ask whether—despite the present sensitivity of the profession to public criticism in light of Watergate—the "public" really is as interested in the Bar and its doings as the Bar thinks it is. With the avalanche of "news" with which the public is daily bombarded by the multiple media, is it realistic in 1975 to believe that public attention will be drawn to and offended by a trial being held in one of scores of courtrooms in a city or county, between private individuals, in which the lawyer who drew a contract now in dispute and who handled all of the negotiations on it is called by his partner to testify on behalf of their long-standing client? Indeed, might it not unfairly affect the cause of the client were it to appear—by the retention of different counsel—that the client had discharged or had lost faith in the witness's firm? There is much to the argument that the Bar, in seeking rightly to be above suspicion, merely fosters greater suspicion—or invites suspicion where none had existed—by the often tortured efforts it undertakes to shield itself from that unknown and unknowable force, public opinion.

Significantly, EC 5-9, which sets forth the modern rationale for the Code provisions, does not attempt to ground the Code on the danger of distrust of either the particular attorney involved or the profession generally. It speaks primarily to the situation where the advocate and the witness are one corporeal being—a matter treated hereinafter—and finds him as such "more easily impeachable for interest and thus . . . a less effective witness," a matter previously discussed *supra*. It also raises the possibility that opposing counsel "may be handicapped in challenging the credibility of the lawyer" when he is both witness and advocate. As to the latter basis, it certainly exists with greater force where witness and advocate are one corporeal being. Absent that situation, however, as strong an argument can be made that the fact that a witness is a

partner or associate of the advocate will have as little restraining influence on opposing counsel as would, for example, the fact that the witness was the adversary's business partner or spouse or child or parent or was the cross-examiner's own business partner or spouse or child or parent or fellow director or next-door neighbor or best friend. Indeed, the attorney might well at some point in time be called upon to cross-examine and impeach the credibility of his own non-party client, who happens to have been an eyewitness to an accident involving two others engaged in the suit. The Code has not attempted to protect the attorney from that embarrassing possibility; neither should its solicitude for him produce artificial constraints on the right of his client's adversary to the counsel and the witnesses of his choice. If the lawyer is doing the job of representing his client properly, as he is enjoined to do by the Code, the identity of those he must cross-examine becomes a matter of happenstance which the Code should not artificially and in a very limited instance seek to control.

Having raised all of these questions as to the underlying premises and goals of the Code and the stricter Connecticut *Jennings* rule, it remains to deal with certain of the practical problems raised by these situations, and to attempt to present alternative guidelines to those to whose automatic invocation we have noted exception. And we begin with what appears from the opinion below to be the hint of an implied expansion of the existing rule to cover past partners and associates.

While the Code appears to proscribe representation by a firm whose *present* partner or associate will be a material witness, and the Code as amended and adopted in Connecticut is even stricter, the opinion below speaks not just to the situation covered by the Code—*present* partners and associates—but also appears to embrace *past* partners (and, presumably, associates). For the Court below at the

beginning of Section II of its opinion defines the issue to be whether Apter or any member of the firm of which "he is or was a member" may act as counsel in a case wherein he will be a witness as to disputed matters. This Court should be mindful of the distinction to be drawn between *present* members and associates and *past* members and associates, a distinction made obvious by the very reason underlying the ban on the former: the possible impression that might be conveyed to the public that the present member or associate might be tempted to color what should be honest, impartial testimony to favor the party his firm is representing. Presumably, one no longer associated with the trial firm would have no such temptation and his testimony, accordingly, would be no more susceptible of public skepticism than if he were the spouse, child, parent, business partner, chief supplier, best customer, or other blood or economic relation of the party. Certainly as to him the ethical problems adumbrated in EC 5-9 and *Jennings* do not exist. He is not both witness and advocate. It thus becomes a threshold question in every instance where the issue of disqualification arises whether the potential witness is at the time of the motion, or will be at the time of his expected testimony, in the firm of the trial counsel.

Turning to the question of present partners and associates it ought to be clear that in a trial the trial attorney himself and those actively participating with him in the conduct of the trial ought not to be witnesses, to be examined by their own associates, cross-examined by opposing counsel, and then arguing to the trier of fact, be it court or jury, that their own testimony is credible and to be credited over that of conflicting witnesses. All of the considerations expressed in EC 5-9 become quite real and immediate in that situation, as do the fears of public misunderstanding and skepticism referred to in *Jennings, supra,* when the witness and trial counsel are joined in one corporeal being.

As intimated above, however, it is a fair question to ask whether those same considerations are as real when the witness is a non-trial-participant partner or associate of the trial counsel, especially when he is testifying at the call of his partner, rather than being subjected to cross-examination by him as a hostile witness. Does the "public" —whose perceptions appear to be the basis of the proscription in *Jennings*—truly equate partners or associates in such a way as to view them as inseparable, thus making the testimony of the witness that of the trial partner? Does the public view with greater skepticism the testimony of trial counsel's non-trial partner than it does the testimony of trial counsel's non-law business partner, or spouse, or parent, or child; or the testimony of the client, or the client's business partner, spouse, parent, child, chief supplier or best customer? It is only by ignoring the increased sophistication of the "public" that one can exalt the lawyer-partner or associate to so unique a position in the suspicions of the public. It is submitted that the partner or associate of trial counsel who has material evidence to give would be no more suspected of warping the truth in the interests of his client, to use *Jennings'* phrase, than would any other person who had a personal or economic interest in the success of the client.

To be sure, this suggested loosening of the Code's strict ban is a more difficult exercise than the present, easily-administered rule. It requires a case-by-case examination of all relevant facts for this determination. Doubtless, not every non-trial-participant partner or associate ought to be permitted to be a witness while his firm tries the case (or vice versa). Certainly, if the witness is to be called by the other side, or is expected to give testimony the client will have to refute and on which his partner will have to cross-examine him to question his credibility, a host of considerations militate against permitting this dual relationship to exist.

There may be other factors as well that bear upon the decision of disqualification, in an attempt to balance the interests of justice and the client with the image to "the public", if it is that image which is to be the basis of the rule. The size of the law firm and the degree of involvement of trial counsel in the events about which his witness-partner is testifying; the economic value of the client to the firm and what percentage of the firm's income is dependent upon that client and his good favor; the capacity in which the witness-partner acquired the knowledge on the basis on which he is testifying—as a corporate officer or director, or as a lawyer involved in the firm's representation of the client; when it was he acquired this knowledge —prior to joining the firm or subsequent thereto; the importance of the testimony to the case for the client; and like factors—all may be relevant.

Certainly, for instance, in a one hundred-lawyer firm with trial department and corporate department carefully separated by personnel, with the lawyers in one department having no material working contact with the lawyers in the other, the testimony of the corporate partner as to his negotiations in a multi-million dollar transaction ought to arouse no legitimate suspicion of warping the truth simply because the questions are put to him by his trial department partner. On the other hand, in a six-lawyer office where each lawyer is frequently working with the other, often on aspects of the same matter, the testimony of one partner as to negotiations may well arouse suspicions if elicited by one of his six partners at trial; and this might be especially so if the client involved happened to be the single most significant the small firm had. In neither case, as the court in *Jennings* stated, might the witness be "exposed to temptation"; but in the latter case the "appearance of wrongdoing" might be greater because of what "the public will be apt to think."

To the extent that the adoption of such a criterion might be thought unfairly to favor the larger firm over the small

firm, it raises a question not so much of fairness as of whether the public image is a legitimate test. For it is only because of the "public image" or of "what the public will be apt to think" that there would appear in these two instances to be any need for court consideration of the question of disqualification. Absent the public image issue, the witness-partners in both firms could testify with equal ease.

Whether, despite the fact that the Code, unlike *Jennings,* appears to have abandoned the "public image" test as relevant, this court wishes in whole or in part to consider it as a criterion of propriety, it must be conceded that it is extremely difficult to fashion a policy guideline based upon what a drafter or a court, acting at considerable remove, thinks "the public"—at some given point in time, on a set of facts none can at present know, with a degree of publicity that may range from glaring to non-existent—might believe or be apt to think about the proprieties of a situation. No one professes to claim that the witness-lawyer will be more apt to lie to help his client; such a belief is indeed expressly disclaimed in *Jennings.* There is no claim that the client would be better served by having to choose between a key witness and a long-standing lawyer. There is no claim that the course of justice will run more smooth, that the whole truth will be more easily ascertainable, if the client must make a Hobson's choice between lawyer as witness and firm as trial counsel. It is—except where witness and trial counsel are one corporeal being—simply a question of *appearances,* and not even the appearance of wrongdoing so much as the appearance of the *possibility* of wrongdoing.

This Court in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation,* —— F. 2d —— (CA-2; 1975), slip op 3669, has recently exhibited a recognition of the importance in lawyer disqualification decisions of the precise facts of the particular case and of the particular law

firm involved, though such a determination may well require greater time and effort than would an automatic invocation of a proscriptive disciplinary rule. In a similar spirit, it is submitted that in considering the question of firm disqualification to try a case in which a non-trial participant partner or associate will be called by the firm, and it is anticipated he will give evidence preponderantly helpful to the client, the court should explore all relevant facts concerning the firm, the witness, the client's needs and desires, the nature of the contemplated testimony, and the relationship of the client and the firm, before passing upon the issue of disqualification. Indeed such a scrutiny should serve to allay whatever suspicions might arise in the "public" mind from a failure automatically to invoke the proscriptions of DR 5-101 (B). Certainly the client and the cause of justice—and hence, the "public" —will be better served by such a case-by-case treatment. For such an examination would allow the court considerable flexibility in accommodating both the demands of the Code and the interest of justice in the case at bar.

The Advocate as Party Issue

The case at bar presents yet another issue, totally separate and apart from the issue of firm disqualification due to a member's being a witness. That issue is whether a firm may continue to represent any defendant in a case in which the firm itself or a member has been named a defendant. That is, may the firm in this case continue to represent Mr. Flanzer and others and also itself or a partner as a defendant; or must it eschew representation of some or all defendants? And if the firm adopts the latter course, and represents only itself or a partner, what effect would or might this have with respect to the confidentiality of its former client's communications to it on the subject matter of the litigation? Can a firm or a partner, accused along with its client of wrongdoing, at-

tempt to absolve itself by casting blame on its co-defendant, and in the course of so doing divulge confidences previously reposed in it by that client? This is an issue only partially avoided by the blanket disqualification of the firm by the court below; for the possibility of breach of confidences through testimony exists because the firm or a partner is a *co-defendant,* and not merely because it is counsel to any party in the suit.

The relevant canons are Canon 5, once again, and also Canon 4. All the Ethical Considerations and Disciplinary Rules of Canon 4 appear relevant. The specific Ethical Considerations and Disciplinary Rules of Canon 5 significant to this issue appear to be the following:

> EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.
>
> EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship

on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other

circumstances, the chance of adverse effect upon his judgment is not unlikely.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

We turn first to the issue of multiple representation. And at the threshold of that issue lies a key question: what is the nature of the claim against the firm or partner; why has it been made a party defendant? Are there allegations made in the complaint of malfeasance or nonfeasance by the firm or partner, for which a sanction by way of order or damages is sought to be imposed? Or is the firm or partner a defendant only for purposes of prospective or protective relief—to garnish funds held by it for other defendants, to enjoin it from transferring assets of other defendants, to ensure jurisdiction over a res in its custody as a trustee or stakeholder? Is the claim, in other words, one as to which the plaintiffs will have to adduce evidence *against* the firm or partner, which the firm will then be required to dispute or explain?

This threshold question is relevant because if the only purpose the firm's presence as defendant serves is jurisdictional or for purposes of relief with respect to assets of others in its possession, and the firm will be expected to experience no evidence against it which it would have to rebut, the likelihood is slight that its "independent professional judgment in behalf of [its clients] will or is likely to be adversely affected by" its representation of itself as well. In the course of representing itself, it would be expected that it would or should do nothing inconsistent with what it would or should do for its clients were it *not* representing itself. To be sure, trials are not predictable; in the course of a trial a point may very well develop which calls for just such a decision. However, the faint theoretical possibility, undiscerned at the outset of the representation as in any way likely, ought to suffice to satisfy the strictures of DR 5-105 (A) in favor of accepting the multiple employment, leaving the possibility to be handled, should it eventuate, to DR 5-105 (B).

If, however, it is apparent at the outset that the nature of the allegations against the firm or partner are such that

evidence of malfeasance or nonfeasance will be adduced against it, which it will be required or expected to rebut, the question necessarily arises whether that rebuttal will or might in any way be inconsistent with what the firm would or should do for the best interests of its client. Obviously, the classic instance of such a defense is: "I took my information and instructions solely from my client." There are innumerable other permutations of this defense, however, and an infinite number of other possibilities. One such possibility is the joint defense—the decision to present a united front on the part of all defendants, including the firm. This necessarily raises the very question involved: Would or should the firm have adopted that defense for its clients had the firm itself or a partner not been a defendant? What is the likelihood that the firm's "independent professional judgment" on behalf of its client was influenced in any way by its own exposure as a defendant? It is submitted that any doubts on this score should be resolved *against* the multiple representation. Such a resolution of the problem does not end the issue, however, but rather, raises two other issues: (1) should the firm continue to represent itself or its partner, and (2) why should not the clients have been asked to consent to the multiple representation pursuant to DR 5-105 (C)?

It is submitted that if the situation is such that the firm must withdraw as counsel for its clients, its obligation to them requires that it refrain from representing itself or its partner as well. How destructive of the lawyer-client relationship and of the confidence (as contrasted to specific confidences) necessarily reposed by a client in his lawyer would it be for a client to be faced in a courtroom with the prospect of his own lawyer actually cross-examining him, cross-examining his witnesses, seeking to advance his own credibility at the expense of theirs. That the firm or partner is a *co-defendant* in the case is bad enough; but to have the lawyer himself assuming as an advocate a position sufficiently pregnant with adverseness

as to require his withdrawal as counsel for the client can only be totally destructive of that respect and confidence in the lawyer-client relationship which it is in the interest of laymen, the Bar, and the courts to keep inviolate. The question here is not one of *image,* of the appearance to outsiders of impropriety. The goal here, in recognition of the very real possibility of a situation developing destructive of a basic concept of Anglo-American jurisprudence—the loyalty and fidelity to his interests which every client has a right to expect of his lawyer—is to prevent that possibility from coming to pass. Though their interests as parties may diverge, the client will not be subjected to his past advocate acting now as his adversary-advocate. While not wholly on all fours, this conclusion is a logical corollary of the settled law in this circuit as set forth in *T.C. Theatre Corp.* v. *Warner Bros. Pictures,* 113 F. Supp. 265 (S.D.N.Y.; 1953), and in many subsequent opinions of this Court itself.

The answer to the second question—why should not the clients be consulted as to their consent under DR 5-105 (C)—on its face is more difficult to answer, especially in light of the arguments advanced *supra* for the client's right to be consulted on firm disqualification if a member or associate will be a witness. The situation presented here, unlike that of the firm-witness issue, is not one in which the danger perceived is the impression on the trier of fact or the public of a client's case being both tried and supported in testimony by members of the same firm. The danger here is that if multiple representation continues, the system is deprived of its basic predicate, zealous advocacy based upon unimpaired independent professional judgment, and the judicial system will accordingly fail in its duty to litigants. The basic predicate in an adversary system is succinctly stated in EC 5-1 and 7-19:

> EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law,

> solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.
>
> EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

The danger, thus, is not the appearance of impropriety, but the clear and present danger to the client *and* to the judicial system that, inevitably, the presentation of the case will be less than it ought to be, thus depriving the court of its ability to sift the truth and weigh all the evidence as it should.

There is also considerable doubt as to whether DR 5-105 (C) was intended to permit consent for multiple representation in litigation situations (let alone in litigation situations where one of the "consenting" parties is the firm itself). If one accepts, as one must, the proposition that the Disciplinary Rules and Ethical Considerations must be read *in pari materia,* one is immediately struck by the language of EC 5-15.

> A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially

> differing interests. If a lawyer accepted such employment and the interest did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

To read EC 5-15 as barring multiple representation of differing and probably potentially differing interests in litigation along with DR 5-105 (C), one comes to the conclusion that the Code may not contemplate the possibility of the parties' consent that in litigation they could be represented by the same firm. How much more telling must this be when one of the clients is the firm itself, where to the danger of the firm's divided loyalty between clients is that of the self-interest of the firm or partner as the client itself.

Such a proscription is also consistent with the celebrated Connecticut case of *Grievance Committee of the Bar of Hartford County* v. *Rottner,* 152 Conn. 59, 203 A. 2d 82 (1964), which adopted a rule, which it held "should rigidly be followed by the legal profession," that "an attorney who has accepted representation of a client [must] decline, while representing such a client, any employment from an adverse party in any matter even though wholly unrelated to the original retainer" (*id.,* at 65). To the extent that the firm or partner itself is a party, seeking as is natural its own self-interest, it could not under Connecticut's "rigidly . . . followed" rule be permitted to solicit and accept its clients' consent in this situation to represent them in litigation if it entertained any doubts as to whether its interests in the litigation would differ at any point from theirs. For, it is submitted, the rationale of *Rottner* does not apply merely to adverse parties in the strict sense of plaintiffs and defendants, but also to parties technically on the same side of the plaintiff-defendant barrier, whose interests might nevertheless diverge in the

litigation, and whose interests might best be served by minimizing their own culpability at the expense of their fellow defendants'. Especially where clients have reposed confidence in their attorney, and have been encouraged to accept his advice in all significant matters, it has wisely been decreed that the attorney ought not to be permitted to place the client in a situation where the client is being asked to give his consent—and thus inferentially being advised of the propriety of giving his consent—that his co-defendant attorney with a differing interest be allowed to represent either the client or the attorney himself or both in the case. It fosters the salutary goal of instilling confidence in the Bar if the Bar is forbidden the occasion to abuse that confidence for its own interests.

Where the "lawyer client" is a *former* partner, as opposed to a *present* partner, the proscription is not so automatic. Nevertheless, while the same general injunctions of Canon 5 obtain with respect to representing differing interests, there ought to be a greater degree of sensitivity to the situation of the former partner-defendant. It might well be, for instance, that a judgment against him might have to be satisfied out of his former firm's malpractice insurance as a judgment arising out of acts occurring at the time he was in practice with that firm. This, in turn, creates a personal interest and stake in the firm itself approaching, at least, that which it would have had as an actual party. Such "former partner" situations ought to be viewed with strict scrutiny.

Client Confidences

Inherent in the entire question of when a firm or a partner or associate, or former partner or associate, is named as a party in a suit involving his conduct in representing a client—whether or not that client is also a co-party—is the question of client confidences and whether and when they may be divulged. And this is a question, as noted

earlier, not resolved simply by disqualifying the firm from acting as *counsel;* for the disclosure comes in testimony from witnesses, both party and non-party, and those witnesses will inevitably include the lawyer-witness as well.

In this area the Code in Canon 4 speaks simply and clearly. Specifically, in DR 4-101 (C) (4), it permits a lawyer to reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or his associates against an accusation of wrongful conduct." Thus, presumably, in situations like the case at bar, both the firm *as a defendant* and its present and past partners *as defendants* could, if "necessary", divulge client confidences or secrets to exculpate themselves in their capacities as defendants, as this Court has recognized. *Meyerhofer* v. *Empire Fire and Marine Insurance Company,* 497 F. 2d 1190 (CA-2; 1974). And this would be so regardless of whether they also represented themselves or other clients in the litigation. Given the permissibility of this disclosure, however, it would appear even more imperative that where clients and lawyers are named as *substantive* co-parties in a suit in which the lawyers will be expected to defend themselves against claims of malfeasance or nonfeasance made in good faith, they should not continued either to represent their clients or themselves.

The ethical permissibility of disclosing client confidences and secrets for the lawyer's own defense raises yet another issue to which the courts ought to be sensitive in considering any motion to disqualify counsel. That is the bona fides of the claim against the lawyer. It should be a matter of searching inquiry whether the lawyer or former lawyer has been named as a party for a legitimate reason, or merely to cause either his disqualification as trial counsel or the unsealing of his lips. The suggestion of such a motive is inspired by the unusual attention focused of late on lawyers' ethics; and the concomitant

tendency in such situations for that salutary and justifiable concern on the part of the courts and the Bar to be subverted to partisan and tactical strategic uses by those whose interest is less in the integrity of the Bar than in some momentary advantage. The inquiry into motive and bona fides is clearly not an easy one. It partakes of the same basic considerations as enter into a determination, on a motion to dismiss or for summary judgment, whether genuine issues of material fact exist. The difficulty of the inquiry, however, cannot excuse the failure to undertake it in the rare situations where these cases arise; for the very integrity of the Code, and its protection from self-interested abuse, is at stake.

Some Final Issues Raised by the Parties

Finally, several issues have been raised in the briefs of the parties which, though not referred to in the opinion below, deserve comment here. The question has been raised as to whether the firm of Apter, Nahum & Lenge is barred from participating in the trial of this matter because (1) it used to represent the predecessor of one of the plaintiff corporations; and (2) as a result of that former representation it is counter-claiming for counsel fees. Here, the argument seeks to bring this case under the umbrella of such cases as *T. C. Theatre Corp.* v. *Warner Bros. Pictures,* 113 F. Supp. 265 (S.D.N.Y.; 1953); *Consolidated Theatres* v. *Warner Bros.,* 216 F. 2d 920 (CA-2; 1954); *Emle Industries, Inc.* v. *Patentex,* 478 F. 2d 562 (CA-2; 1973); and *Hull* v. *Celanese,* 513 F. 2d 568 (CA-2; 1975), with respect to suits against a former client.

The central question in this regard—and in all suits in which is involved a closely held corporation such as Elmenco evidently was—is: Who or what was the "former client" whose confidences it is the purpose of these cases to protect from the possibility of adversary disclosure?

Is there any identity of character or interest—the same shareholders, the same directors, the same officers—between the predecessor corporation and the new plaintiff corporation, such that those reposing confidences or on whose behalf confidences were reposed in the law firm might now be subjected to the use of those confidences against them? Or is it the case that, whether through the sale of assets or a sale of stock, the new corporation, except in name or corporate genealogy, is in essence a new corporation, with no contacts with the predecessor corporation relevant to the ethical considerations involved? For if the latter is the case, disqualification should not be posited on the technicalities of corporate history; that would be a subversion of the purposes that the Canons were intended to serve. And especially would this be so if the very persons who in essence comprised the predecessor corporation and reposed the confidences were now the present clients of the firm sought to be disqualified. The inquiry of this court, therefore, must look beyond form to substance, and probe the facts of the particular case involved.

With respect to the firm's counterclaim, the same inquiry would be relevant here as well. An additional consideration would be whether the suit for past legal services can be severed from the major case; for if it can be, and by that severance a ground of possible disqualification can be eliminated, the interests of justice would best be served by that severance. As for the use of client confidences by the firm even if the counterclaim for fees is severed, even assuming that the new corporation was found to be identical in character and interest to its predecessor so that the confidences would be the confidences of a "former client", the use of those confidences would appear to be specifically sanctioned by DR 4-101 (C) (4) when "necessary". (With so much emphasis on disqualification, it is well once again to note that disqualification of the firm from trying the case will not cure the problem of use or misuse of confidences of former clients; for those confidences will be

disclosed, if at all, not by the attorney trying the case, but by parties and witnesses giving evidence in the case; so that the lawyer disqualified from trying the case may still as a witness be in a position to divulge those confidences.)

A claim is also made that the firm should be disqualified because it as a firm has counterclaimed against the plaintiff IEC for fees claimed to arise from representation of IEC—a claim of representation denied by IEC and its counsel—as counsel in the negotiations leading to the contract which is the subject matter of the instant suit. The theory of disqualification here appears to be (1) that the firm would be representing its present clients (the defendants) against its former client (IEC) in a matter arising out of its former representation of IEC, thus exposing IEC to the revelation of client confidences; and (2) that the firm has a personal stake in the litigation (the fee for which it is counterclaiming) and therefore should not be permitted to act as counsel. As to the first ground, a relevant inquiry for the court would be whether IEC admits or denies the fact of representation (as contrasted with the *fee* sought for the alleged representation); for if IEC denies the fact of representation by the firm, it is placed in an anomalous position of denying the allegation that it was ever represented by the firm, but insisting that because the firm claims it represented IEC, the firm must be disqualified from representing defendants sued by IEC. It is respectfully submitted that no party should be permitted to ride two horses when the result is disqualification of a firm from representing clients who chose it as their counsel.

With respect to the second ground, the counterclaim for alleged past fees due, the relevant inquiry of this court should be, again, whether that matter can be severed from the major case; for if it can be, and that would eliminate a ground of disqualification, the interests of justice would dictate severance. So far as the argument with respect to

the firm having acquired a financial interest in the litigation is concerned, it would appear that the argument is a misreading of DR 5-103. That Rule was never intended to bar a firm from suing for a fee for past services rendered. Rather, it was intended to prevent a firm representing a client from acquiring an interest in that client's case. Here, the alleged "interest" is the fee for alleged (and denied) past services rendered, and antedates the "cause of action or subject matter of litigation" the firm is conducting for its client (DR 5-103 (A)).

A final point is the argument by plaintiffs that the firm if it is to be disqualified should be disqualified not merely from the *trial* of the case—as ordered by the court below—but from all pre-trial representation as well. Here, too, the relevant inquiry is one as to the *facts* of the particular case, the nature of the disqualifying conduct, and the purposes to be served by the disqualification. If, for instance, the disqualification is posited on the appearance to the public of impropriety—as *Jennings* appears to do with respect to the advocate as a material witness—there would appear no need to deny defendants counsel of their choice in the pre-trial, and therefore essentially non-public, stages, so long as defendants associate with themselves new trial counsel early enough so that, working with the old firm during the pre-trial stages, the new firm can familiarize itself with the case early enough so as not to delay the trial. If the disqualification is due to representation of former clients and the fear of the use of confidences of those former clients against them, then while early disqualification will not prevent the ultimate disclosure of these confidences by the firm or the partner acting as *witness,* early disqualification might conceivably prevent the use of the disclosure by counsel in the *preparation* of the case, especially if disqualification is coupled with an injunction against the disclosure of the confidences by the lawyer or firm except to its *own* counsel representing it in the preparation of its own defense, separate and apart

from the defense of the other defendant; or, where the firm and counsel is merely a witness and not a co-party, an injunction barring disclosure of former clients' confidences to the new lawyer replacing it.

Conclusion

The theme of this amicus brief, it will be discerned, has been the necessity, in each case concerning a motion to disqualify, of examining the particular facts of the case to determine whether, not in form but in actual substance, facts exist requiring disqualification. It will also be noted that nowhere in this brief—as indeed, nowhere in the opinion of the court below—has the final Canon, Canon 9, been invoked. This omission has not been due, it should be noted, to any view that Canon 9 is inappropriate, unimportant, or inapposite to the considerations of this Court. It represents an important desideratum in ordering the conduct of all lawyers at all times and should always be an important consideration in that process. The plea this brief would make in that regard, however, is that a too-easy recourse to Canon 9, when no other Canon or Rule appears to have been violated, may well cause greater harm to the system, to the litigants, and hence to the public, than the looked-for benefits Canon 9 may bestow.

The goal toward which the Bar should strive, and toward which the courts should ever prod it, is ethical conduct. That statement, standing alone, may appear simplistic and, indeed, superfluous; but it is respectfully submitted that it is not. For all too often the goal of the Bar—especially in times such as these when the Bar has been pilloried for the excesses of some of its members in government—appears more oriented to Madison Avenue image-improvement, without any thought or intent to improving the substance of its actions. All too often the goal of the Bar appears to be merely avoiding the *appear-*

ance of professional impropriety; and in support of that goal, Canon 9 is often too freely invoked as an excuse, and not a reason.

While the appearance of impropriety must be avoided, there is nevertheless a danger in exalting that appearance over substance and, by invoking Canon 9 too freely, penalizing the ethical lawyer whose action through misconstruction or misinformation might *appear* to the uninformed to be improper; while at the same time condoning those who, though acting improperly and unethically, have mastered the art of public relations by skillful masking of fact and intent, and who thus run no risk of *appearing* to be acting improperly, however improper may be their actions in fact.

The skillful advocate trained, as one former Connecticut Chief Justice used to say, to "make the worse appear the better," and vice versa, can doubtless create an atmosphere of doubt and suspicion where none had theretofore existed in the most fecund imagination. He can make the devoted daughter appear a scheming shrew and the honest bookkeeper a bumbling incompetent. By skillful questioning he can make the sincerest note of caution sound like an ominous threat. This is his craft, and many have been the books extolling the skillful cross-examiner who snatches victory from the jaws of certain defeat by so doing. That same skill, we submit, can in the wrong hands be subverted to creation of doubts, suspicions, and fancied improprieties in the conduct or intent of opposing counsel in an attempt to disqualify lest the "public" discern the *appearance* of professional impropriety.

The major theme of this brief, in its call for a careful factual examination by the *court* in each such instance, is to exalt substance over form, and not to be too quick to accede to every suggestion as to *appearances.* If in fact the court is satisfied that substantively there is no ethical impropriety involved, the court ought perhaps to view

the ends of justice and the interests of the litigants at least as on the same level as the possible appearances to an uninformed public of the concededly ethical conduct involved.

The "public" is, we submit, less interested in and more sophisticated about these matters than the Bar has ever believed, or perhaps ever wanted to believe. And the cure for misimpressions is, after all, not the curtailment of otherwise ethical conduct, but the education of the public by disinterested persons as to why what may *appear* on the surface to be improper is not in fact so but is, rather, a necessary concomitant of the adversary system which is the cornerstone of Anglo-American jurisprudence. Indeed, were a poll conducted of the "public", it would probably reveal far more public opprobrium for the criminal lawyer who succeeds in winning an acquittal for his client by befuddling the victim's widow than for the corporate partner of a 100-member firm testifying in favor of his client as to a contract he negotiated in a trial conducted by his trial partner. Yet no one would for that reason suggest that the criminal lawyer curtail his cross-examinations in defense of lives and liberties of his clients. Rather, the Bar is urged to educate the public on the rights of accuseds, and on the glory of a system that affords the meanest prisoner zealous counsel in defense of his right to life and liberty. So must it be with all misunderstanding and misinformation. The public must be informed, the public must be educated; for if the Bar is acting ethically and properly, it should not fear to continue to do so on account of the misunderstandings of uninformed public opinion.

The court below carefully eschewed basing its decision on Canon 9. It perceived ethical impropriety in the violation of Canon 5 which, in its Ethical Considerations, also eschews considerations of public appearances. This Court is respectfully requested to do likewise, and to examine

the facts of the case, to weigh the competing interests involved, and to resolve the issue in a manner that will conduce to the substance, and not merely to the appearance, of ethical conduct.

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ELECTRONICS CORPORATION
AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-
Cross Appellants,

against

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-
Cross Appellees,

J. KEVIN FOLEY,

Defendant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 28th day of August, 1975, he served two copies of the Amicus Curiae Connecticut Bar Association on Murtha, Cullina, Richter & Pinney, Esqs. the attorneys for the Plaintiffs-Appellees-Cross Appellants by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 101 Pearl Street, Hartford, Conn. 06103) ~~Nxxx~~, that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
28th day of August, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976

Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
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INTERNATIONAL ELECTRONICS CORPORATION
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JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

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Cross Appellees,

J. KEVIN FOLEY,

Defendant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 28th day of August, 1975, he served two copies of the Amicus Curiae Connecticut Bar Association on Morris Apter and Arnold E. Buchman, Esqs. the attorneys for the Defendants-Appellants-Cross Appellees by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 101 Pearl Street, Hartford, Conn. 06103) ~~Nxx~~, that being the address designated by them for that purpose upon the preceding papers in this action.

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